No. 79-7

In the Supreme Court of the United States

OCTOBER TERM, 1978

G. PATRICK MORRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D-1 to D-9), as amended on denial of rehearing (Pet. App. D-10 to D-11), is reported at 593 F. 2d 851. The opinion of the district court (Pet. App. C) is not reported. The decision of the Interior Board of Land Appeals (Pet. App. B) is reported at 19 I.B.L.A. 350.

JURISDICTION

The judgment of the court of appeals was entered November 16, 1978 (Pet. App. D-1). A petition for rehearing was denied on April 9, 1979 (Pet. App. D-10). The petition for a writ of certiorari was filed July 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2 of the Desert Land Act of 1908, 43 U.S.C. 324, provides:

> No assignment after March 28, 1908, of an entry made under sections 321 to 323, 325 and 327 to 329 of this title [43 U.S.C.] shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Section 7 of the Desert Land Act of 1877, 43 U.S.C. 329, provides:

> At any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to such officer of the additional sum of $1 per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to March 3, 1891: *Provided however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under sections 321 to 323, 325 and 327 to 329 of this title [43 U.S.C.] shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid thereof, shall be forfeited to the United States.

QUESTION PRESENTED

Whether the Interior Board of Land Appeals properly concluded that petitioners had unlawfully assigned their entries onto public land in violation of Sections 2 and 7 of the Desert Land Act, 43 U.S.C. 324 and 329, and that therefore such entries should be forfeited.

STATEMENT

In early 1963, petitioner G. Patrick Morris, along with 11 other individuals who were his friends or relatives ("the entrymen"), set out to develop a substantial area of desert land along the Snake River in Idaho. The entrymen obtained water permits from the State of Idaho and then, pursuant to the Desert Land Act, 43 U.S.C. 321 *et seq.*, they filed declarations with the Department of the Interior regarding 12 adjacent 320-acre parcels of previously undeveloped public land. Thereafter, the entrymen assigned the water permits to the Sailor Creek Water Company[1] and also entered into a series of lease, contract and mortgage agreements with Sailor Creek. Under these agreements, Sailor Creek promised to construct an irrigation system for the 12 parcels. The entrymen agreed

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[1] Hiller Engineering Corporation and Farmland-Idaho, Inc., both subsidiaries of Hale Brothers Associates, founded Sailor Creek as a joint venture in July 1963. Subsequently Hiller Engineering withdrew from the venture and Farmland-Idaho, now called Farm Development Corporation (the corporate petitioner) continued to run the irrigation project under the name Sailor Creek.

to pay for the irrigation project, payment to be secured solely by nonrecourse mortgages on each of the parcels. In addition, 11 of the entrymen leased their land to Morris who, in turn, arranged for Sailor Creek to lease all 12 entries for a total of 11 years. The rental was calculated to cover the entrymen's taxes and payments for the irrigation system. The lease also provided that Sailor Creek exercised total control of the farming operations and that it retained all revenue from those operations. Sailor Creek thus became both the mortgagee and lessee of more than 3700 acres of public land (Pet. App. A-2 to A-15, A-32; B-5 to B-10; D-2).[2]

In 1966, after it became aware of the totality of the arrangements between the entrymen and Sailor Creek, the Bureau of Land Management ("BLM") filed contests against the entries. In particular, BLM alleged that the entrymen had unlawfully assigned their interests to a corporation in violation of 43 U.S.C. 324 and also that the Sailor Creek project, which involved more than 3,700 acres, exceeded the 320-acre limitation set forth in 43 U.S.C. 329.[3] Accordingly, BLM sought cancellation and forfeiture of the entries (Pet. App. A-26; B-26).

Following an evidentiary hearing, the administrative law judge dismissed the complaints (Pet. App. A-21 to A-48). With regard to BLM's claim that the entrymen had unlawfully assigned their parcels to a corporation, the ALJ concluded that the lease-mortgage arrangements did

[2]By 1965, Sailor Creek completed the irrigation project and installed farm equipment. Both the project and the equipment were primarily designed for farming the entire 12 parcels as one farm (Pet. App. A-31; C-3).

[3]In addition BLM asserted that the entrymen had not acted in good faith, had filed false statements, and had not otherwise complied with the Desert Land Act. The administrative law judge dismissed these contentions and they are not before this Court.

not constitute an assignment within the purview of 43 U.S.C. 324. The ALJ further found that petitioners did not exceed the 320-acre limit set by 43 U.S.C. 329 because Sailor Creek, the lessee-mortgage of the 12 parcels, did not absolutely possess all of the rights of the entrymen.

The BLM appealed and the Interior Board of Land Appeals ("IBLA") reversed. The IBLA found (Pet. App. B-10 to B-23) that Sailor Creek's possessory and legal interests under the lease-mortgage agreements in more than 3,700 acres of public land constituted a "hold[ing] [of desert land] by assignment or otherwise" proscribed by Section 329.[4] Moreover, the IBLA rejected petitioners' contention that the government was estopped from seeking forfeiture of the entries even if their arrangements violated the Desert Land Act. Adhering to well established precedent the IBLA held that failure to comply with Section 329 gave rise to a forfeiture and that there was no basis for an estoppel because petitioners did not rely on any official action. The BLM therefore ordered the entries cancelled (Pet. App. B-23 to B-27).

The entrymen then filed suit in the United States District Court for the District of Idaho for review of the IBLA decision. On cross-motions for summary judgment, the district court agreed with the IBLA that the arrangements between the entrymen and the Sailor Creek Water Company were "holdings" prohibited by Section 329. Furthermore, the district court also concluded that the lease-mortgage transactions constituted unlawful assignments within the meaning of Section 324 (C-4 to C-6, C-15). The district court, however, reversed the IBLA's cancellation order, ruling that, in light of the changes and

[4]The IBLA strongly suggested (Pet. App. B-21) that the arrangements also constituted unlawful assignments in violation of Section 324.

delays in implementing Department of the Interior policies, such a remedy would be "egregiously harsh under the circumstances of this case" (Pet. App. C-10). The district court also held that the United States was estopped from applying Interior's interpretation of Section 329 (*id.* at C-12). Instead, the district court ordered the Secretary to issue the contested patents upon proof that Sailor Creek had divested itself of all impermissible interests in the entries (Pet. App. C-13, C-16).

Both sides appealed. The court of appeals also concluded that the lease-mortgage agreements between the entrymen and Sailor Creek violated both Sections 324 and 329, and that the entries were therefore subject to cancellation (Pet. App. D-3 to D-4). The court of appeals, however, reversed the district court, holding that the Department of the Interior was not estopped from enforcing the provisions of the Desert Land Act, even though it did not challenge the entries until the development work was complete. The court observed that there was no basis for estoppel because the government had no knowledge of the terms of the contracts between the entrymen and Sailor Creek until after petitioners had completed their development scheme (*id.* at D-6 to D-8). Accordingly, the court of appeals directed affirmance of the IBLA's decision against the entrymen (*id.* at D-9).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals, and further review of this essentially fact bound case is unwarranted.

1. Petitioners primarily contend (Pet. 18-46) that the lease-mortgage arrangements between the entrymen and Sailor Creek did not constitute a "holding by assignment or otherwise" in violation of Sections 324 and 329. Both

courts below and the IBLA correctly resolved this issue against petitioners. At the outset, we note that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And here, there are "compelling indications" that the Secretary's reasonable interpretation of the statutory language effectuates the congressional intent underlying the Desert Land Act.

The Act was intended to encourage individual farmers to reclaim and farm small parcels of desert land for their own benefit. See *Reed* v. *Morton*, 480 F. 2d 634, 642 (9th Cir.), cert. denied, 414 U.S. 1064 (1973) ("Congress never intended bargain-price desert land to be provided for the benefit of corporations or large landholders"); *Chaplin* v. *United States*, 193 F. 879, 881-882 (9th Cir.), cert. denied, 225 U.S. 705-706 (1912). The original Act, however, did not preclude assignments of entries. Accordingly, speculators, land companies, and cattle barons flagrantly violated the purpose of the Act (and similar land development statutes) by employing dummy entrymen to acquire control of large areas. See, *e.g.*, P. Gates, *History of Public Land Law Development* 638-647 (1968); B. Hibbard, *A History of the Public Land Policies* 424-432 (1939); V. Carstensen, *The Public Lands* 306-307, 315 (1963). Congress responded to these abuses by prohibiting entrymen from assigning their interests to unqualified individuals (*i.e.*, someone who already has taken the maximum 320 acres under the Act) and to corporations. Desert Land Act of 1908, ch. 112, Section 2, 35 Stat. 52. It is apparent that the particular transactions involved in this case run afoul of both the letter and the spirit of Section 324.

Most of the entrymen, who were friends and relatives of petitioner Morris, were essentially dummies: they were unaware of the details of the transactions and their money was not at risk.[5] Furthermore, immediately after filing their declarations of entry, the entrymen transferred their possessory and legal interests in the public lands to an ineligible corporation by means of long term leases and mortgages. Thereafter, Sailor Creek, which had obtained virtually complete control of more than 3,700 acres of public land, set out to cultivate that land as a single farming unit for its own benefit. In short, petitioners unlawfully assigned their entries in violation of Section 324. See *United States* v. *Shearman*, 73 Int. Dec. 386, 428 (1966), aff'd *sub nom. Reed* v. *Morton*, 480 F. 2d 634 (9th Cir.), cert. denied, 414 U.S. 1064 (1973); *United States* v. *Law*, 81 Int. Dec. 794, 797-799 (1974).[6]

Moreover, even assuming that the entrymen did not technically assign their entries, the lower courts and the Secretary were entitled to find that petitioners unlawfully held more than 320 acres of desert land "by assignment *or otherwise*." 43 U.S.C. 329 (emphasis supplied). Congress'

[5]The rental covered their costs such as taxes and the water contract payments. The entrymen were further protected from risk by the nonrecourse nature of the water contracts and mortgages.

[6]Petitioners erroneously suggest (Pet. 43-45) that the Department of the Interior has been inconsistent in its definition and application of the word "assignment." In accordance with its obligation to ensure that Congress' intent is effectuated, the Secretary has always analyzed the substance rather than the form of land transactions affected pursuant to the various Acts providing for patenting of public lands. See, *e.g.*, *Jones* v. *United States*, 258 U.S. 40, 45-48 (1922). And the Secretary has consistently invoked Sections 324 and 329 to contest arrangements such as those at issue here. See *United States* v. *Shearman*, *supra*; *United States* v. *Law*, *supra*. That the Secretary was not faced with assignments essentially identical to those in this case prior to 1966 does not constitute an inconsistent administrative practice.

use of the phrase "or otherwise" plainly indicates that arrangements other than assignments are prohibited by the Act. Here the entrymen conveyed essentially absolute control and possession of the twelve parcels to Sailor Creek for a long period of time. Thereafter, Sailor Creek rather than the entrymen or their agents irrigated and farmed all of the lands for its profit. Given Sailor Creek's possession and appropriation of these lands, the IBLA and the courts below reasonably found that the totality of these particular arrangements constituted a "holding"[7] of excess acreage prohibited by Section 329.[8] See *United States* v. *Law*; *United States* v. *Shearman*, *supra*.[9]

[7]To "hold" land does not require legal title. See, *e.g.*, *Black's Law Dictionary* 864 (rev. 4th ed. 1968); 1 *Bouvier's Law Dictionary* 951 (Rawle rev. 1897); *Navajo Tribe of Indians* v. *State of Utah*, 80 Int. Dec. 441, 507 (1973). Indeed, since title remains in the United States until the patent is issued, petitioners' cramped construction of "hold" would render Section 329 nugatory.

[8]None of the numerous cases cited by petitioners, which involve different statutes and different factual patterns, are in conflict with the instant decision. See Pet. App. B-12 to B-20.

[9]As the district court aptly noted (Pet. App. C-5 to C-6):

> The obvious purpose of the holding restrictions was to limit the amount of land that one individual or entity could develop in order to allow as many individuals as possible to apply for and enter the desert lands. This limitation prohibits the use of "dummy" entrymen and to prevent speculative large holdings by a few individuals. The interpretation advanced by the entrymen would allow just such a result. One individual or entity could enlist the aid of numerous entrymen to apply for the entry to the lands. This individual could then lease each of the entries from the entrymen and assume full control of the lands. The entrymen, as lessors, would retain ownership, but the lessee would have the benefits of vast acres of desert land. While it is true that the individual entrymen would receive benefits in the form of rent, the major benefit would accrue to the lessee. Using this method, the one person could effectively tie up all remaining desert lands, a result clearly not envisioned by the drafters of the Act.

2. Petitioners also contend (Pet. 55-65) that even if their arrangements were illegal, cancellation and forfeiture of the entries was inappropriate. These claims are without merit.

a. Petitioners first suggest (Pet. 55-60) that under the Secretary's own regulations and interpretations an invalid assignment results in voidance of the assignment and not cancellation of the entry. To be sure, where an entryman in good faith submits a proposed assignment to the Secretary for approval and that assignment is determined to be improper, the entryman does not forfeit his claim. See 43 C.F.R. 2521.3(c)(3). Here, however, petitioners never submitted their lease-mortgage agreements for preclearance. The BLM uncovered the totality of petitioners' arrangements after their consummation. Those arrangements ran afoul of both Sections 324 and 329, and Section 329 clearly provides that where the Secretary shows that the entry "fail[ed] to comply with the requirements of law" the entry "shall be cancelled, and the lands, and moneys paid therefore, shall be forfeited to the United States." See *Reed* v. *Morton*, *supra*; Freeman v. *Laxson*, 48 Pub. Lands Dec. 519 (1922).[10]

b. Petitioners further argue (Pet. 60-65) that the government was estopped from enforcing the forfeiture provisions of the Act in this case. It is doubtful whether the government may ever be estopped from enforcing the conditions set by Congress for the alienation of public

[10]Petitioners' reliance on *Freeman* v. *Laxson*, *supra*, is completely misplaced. There, as here, the entryman failed to disclose the assignment and there, as here, the Secretary ordered forfeiture of the entry upon proof of an illegal assignment. "But where parties fail to submit the assignment to the [BLM], they act at their own risk and if the fact of assignment is brought to the attention of the [Interior] Department by contest alleging disqualification of the assignee, such charge constitutes sufficient grounds for a contest and for cancellation of the entry if proven * * *." 48 Pub. Lands Dec. at 520.

property. See, *e.g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-385 (1947); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Goldberg* v. *Weinberger*, 546 F. 2d 477, 480-481 (2d Cir. 1972), cert. denied, 431 U.S. 937 (1977). But, in any event, there is no basis for an estoppel against a private party, much less the government, where, as here, the party to be estopped neither affirmatively misled anyone nor had knowledge of the underlying circumstances. See, *e.g.*, *Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5, 8-9 (1973); *United States* v. *Ruby Co.*, 588 F. 2d 697, 703-705 (9th Cir. 1978). As the IBLA observed (Pet. App. B-26), "[o]ne could scarely expect the Government to caution parties against illegal acts when such acts are not brought to the Government's attention until after their consummation."

c. Nor was the Secretary without power to cancel the entries in the absence of a published rule on this subject. See Pet. 46-55.[11] Rulemaking may be appropriate in those circumstances in which the Secretary seeks to "fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974); see 43 U.S.C. 1201. Here, however, Congress has explicitly provided that entrymen may not assign their interests to corporations and that no one may hold by assignment or otherwise more than 320 acres of desert land. See 43 U.S.C. 324 and 329. The Secretary sought to apply these statutory standards to the facts of an individual case, and in such circumstances, he has broad discretion to proceed by way of ad hoc adjudication rather than by rulemaking. See, *e.g.*, *SEC* v.

[11]We note that in any event the Secretary did have a regulation in effect at the time that petitioners filed their entry declarations (see Pet. 56), and that regulation directed petitioners' attention to *Freeman* v. *Laxson*, *supra*, and the risk of forfeiture involved in clandestine assignments. See note 10, *supra*.

Chenery Corp., 332 U.S. 194, 203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974). Indeed, given the myriad of different contractual arrangements that might be used to disguise unlawful assignments and holdings, ad hoc adjudication seems preferable to general rules in this area. See *id.* at 294.[12]

3. Finally, petitioners erroneously claim (Pet. 65-74) that the Secretary's action has somehow deprived them of vested rights. The filing of an application is only the initial step in obtaining title. Prior to patent, the Secretary retains jurisdiction over the public lands and he is required to ensure that the Department's actions accord with the laws governing disposition of public land. See, *e.g.*, *West* v. *Standard oil Co.*, 278 U.S. 200, 210 (1929); *Utah Power & Light Co.* v. *United States*, *supra*. As this Court explained in *Cameron* v. *United States*, 252 U.S. 450, 460 (1920) (quoted with approval in *Best* v. *Humboldt Placer Minning Co.*, 371 U.S. 334, 337 (1963):

> [N]o right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.[13]

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[12]Of course, the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 500 *et seq.*, have no application to adjudicative proceedings such as this one. See, *e.g.*, *Mehta* v. *INS*, 574 F. 2d 701, 705 (2d Cir. 1978).

[13]Even if the Secretary had previously failed to enforce the terms of the Act, but see, *e.g.*, *Freeman* v. *Laxson*, *supra*, he was not precluded from doing so in this case, since "[t]he Secretary can alienate interests in land belonging to the United States only within the limits authorized by law." *Union Oil Co.* v. *Morton*, 521 F. 2d 743, 748 (9th Cir. 1975). Cf. *Baltimore & Ohio R.R.* v. *Jackson*, 353 U.S. 325, 330-331 (1957). Here, of course, petitioners were on notice that their failure to disclose the arrangements to the BLM subjected their entries to forfeiture if those arrangements later proved to be unlawful. See notes 10 and 11, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

DOJ-1979-08